Orson E. Coe Pontiac-GMC Truck, Inc. *and* District Lodge 97, International Association of Machinists and Aerospace Workers, AFL–CIO. Case 7–CA–41855

June 7, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge filed on March 11, 1999, the General Counsel of the National Labor Relations Board issued a complaint on March 18, 1999, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7–RC–21455. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and an amended admitting in part and not specifically admitting or denying in part the allegations in the complaint.

On April 26, 1999, the General Counsel filed a Motion for Summary Judgment. On April 29, 1999, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer and amended answer, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the Board's unit determination in the underlying representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding.[1] The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co.* v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.[2]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all times, the Respondent, a corporation, with an office and place of business in Grand Rapids, Michigan, has been engaged in the retail sale and service of new and used automobiles. During the calendar year ending December 31, 1998, the Respondent, in the conduct of its business operations described above, had gross revenues from all sources in excess of $500,000. Also during the same period of time it purchased and caused to be shipped to its Grand Rapids facility goods and materials valued in excess of $50,000 directly from suppliers located outside the State of Michigan.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held January 20, 1999, the Union was certified on January 28, 1999, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time service and lube/oil technicians employed at the Respondent's 2727 28th Street, S.E., Grand Rapids, Michigan facility; but *excluding* all sales employees, service advisors, car porters, parts employees, body shop technicians, dispatchers, billing employees, appointment takers, warranty

[1] We reject the Respondent's Second Affirmative Defense that the Regional Director disregarded the Board's Order of January 13, 1999,"requiring that the car prep/finisher technicians be included in the bargaining unit." That clearly was not the Board's decision. Rather, as the Order plainly states, the employee in the classification was to be permitted to vote subject to challenge. The Regional Director did not, however, note the effect of the Board's decision in the certification. Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. NLRB Casehandling Manual (Part Two) Representation Proceedings, Sec. 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add the car prep/finisher technician to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. See *Kirkhill Rubber Co*., 306 NLRB 559 (1992); *NLRB v. Dickerson-Chapman, Inc*., 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992), and cases there cited. Accordingly, the unit description is amended to delete the exclusion of the car prep/finisher technician and to note that this position is neither included nor excluded. This amendment does not however warrant denial of this motion as it is clear from the Respondent's answer and its response to the motion that it is also refusing to honor the certification because of the scope of the unit. Indeed, the Respondent's primary objection to the certification is the failure to include all its Service Department employees in the unit. Thus, it is appropriate to enter the requested order. If, however, the above noted amendment to the certification prompts the Respondent to waive its primary objection and to honor the certification, the Board will consider a timely motion by the Respondent for vacation of this order.

[2] Member Hurtgen dissented from the certification in the underlying representation case. He would have granted review of the Regional Director's decision on the unit issue. He agrees however, that nothing new is presented in this proceeding and, accordingly, for institutional reasons agrees, that summary judgment is appropriate.

clerks, cashiers, office clerical employees, guards and supervisors as defined in the Act.[3]

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since February 10, 1999, the Union, by letter, has requested the Respondent to bargain, and, since February 18, 1999, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after February 18, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Orson E. Coe Pontiac-GMC Truck, Inc., Grand Rapids, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with District Lodge 97, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time service and lube/oil technicians employed at the Respondent's 2727 28th Street, S.E., Grand Rapids, Michigan facility; but *excluding* all sales employees, service advisors, car porters, parts employees, body shop technicians, dispatchers, billing employees, appointment takers, warranty clerks, cashiers, office clerical employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Grand Rapids, Michigan, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 7 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 18, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with District Lodge 97, International Association of Machinists and Aerospace Workers, AFL–CIO as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

[3] Car prep/finisher technicians are neither included nor excluded.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

> All full-time and regular part-time service and lube/oil technicians employed at our 2727 28th Street, S.E., Grand Rapids, Michigan facility; but *excluding* all sales employees, service advisors, car porters, parts employees, body shop technicians, dispatchers, billing employees, appointment takers, warranty clerks, cashiers, office clerical employees, guards and supervisors as defined in the Act.

ORSON E. COE PONTIAC-GMC TRUCK, INC.